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**PP**

**v.**

**NORHAZWAN ABD WAHAB**

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HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CRIMINAL TRIAL NO: 45-53-12/2011]
27 FEBRUARY 2013

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***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,767g of cannabis - Possession and knowledge - Whether accused had custody and control of bag containing drugs - Whether evidence of accused rebutted deeming provision of possession and knowledge - Whether prosecution witness truthful and reliable - Whether accused's exculpatory evidence stood unshaken - Whether prosecution proven its case beyond reasonable doubt - Criminal Procedure Code, s. 182A(3) - Dangerous Drugs Act 1952, s. 37(d)*

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The accused was charged with the offence of trafficking of dangerous drugs, to wit, 1,767g of cannabis on 30 March 2011, at 5.30pm behind Lorong 11, Taman Guar Perahu, Kubang Semang, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts of the case was that, acting on information received pertaining to drug trafficking activities, the accused was stopped and detained while riding a Honda EX5 motorcycle. A sports bag, P14, which was recovered from the carrier of the motorcycle, was seized and examined, and was found to contain two slabs of compressed dried leaves, which was subsequently analysed and confirmed to be cannabis. The prosecution produced evidence before the court that led to the inference that the accused was in custody and control of P14, and that he had knowledge that P14 contained cannabis. As a *prima facie* case had been made out against the accused, he was accordingly called upon to enter his defence. The accused, in his defence, submitted that he had gone to Kubang Semang area at the request of one Apit @ Hafiz (SP6). SP6 had then placed a bag in the carrier of the accused's motorcycle. According to the accused, he had attempted to open the bag but was disallowed by SP6. The accused denied that the bag belonged to him and that he did not know the said bag contained cannabis. The accused further submitted that his wallet containing his identity card, driving license and Maybank ATM card was found in his rear trousers

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pocket and not in P14 as alleged by the prosecution. The issues that arose were: (i) whether there was affirmative or positive evidence to prove that the accused had possession of P14 with knowledge of cannabis in it; and (ii) whether the accused was trafficking in the said cannabis.

**Held (acquitting and discharging accused):**

**(1)** The accused was neither shakened nor broken and his evidence remained steadfast that the bag, P14, was not his and that he did not know its contents. The recovery of the accused's wallet containing his personal items in P14 was too good to be true. No sane or reasonable person would place his wallet (containing his identity card, driving licence and Maybank ATM card) in P14 knowing that the said bag contained proscribed drugs which attracted the death penalty. The version of the accused that his wallet was recovered from his rear trousers pocket was more probable. That being the case, the accused's evidence had rebutted the deeming provision of possession and knowledge of the drugs under s. 37(d) of the Act. (paras 24 & 25)

**(2)** The existence of SP6 and the role played by him was disclosed by the accused to his father, SP2, as early as 10pm on 30 March 2011. The accused informed SP2 by phone that he was detained by the police because of SP6. The investigating officer, SP5, too said that a cautioned statement under s. 37 of the Act was recorded from the accused where a character named Apit was mentioned. Thus, the existence and role played by SP6 could not simply be dismissed as improbable in the circumstances of this case. (para 29)

**(3)** The prosecution sought to rebut the defence case by calling a rebuttal witness, SP6, who was found to be an untruthful and unreliable witness. SP6's evidence was rejected regarding his whereabouts on 30 March 2011. Thus, the accused's exculpatory evidence stood unshaken but the prosecution's rebuttal evidence had collapsed. In a criminal trial, the accused was allowed to take every opportunity to show the weaknesses or defects in the prosecution case. Thus, this court was not in a position to invoke the presumption under s. 37(d) of the Act and amend the charge under s. 12(2),

punishable under s. 39A(2) of the Act as was done in *PP v. Letchumanan Suppiah*. As the prosecution had not proved its case beyond reasonable doubt, the accused was accordingly acquitted and discharged (s. 182A(3) of the Criminal Procedure Code). (paras 31 & 32)

**Case(s) referred to:**
*Deputy Public Prosecutor v. Brooks [1974] AC 862* ***(refd)***
*Karthiyayani & Anor v. Lee Leong Sin & Anor [1974] 1 LNS 61 FC* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(foll)***
*Neo Koon Cheo v. Regina [1959] 1 LNS 64 HC* ***(refd)***
*PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC* ***(foll)***
*PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC* ***(refd)***
*PP v. Letchumanan Suppiah [2006] 1 CLJ 557 CA* ***(dist)***
*PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC* ***(refd)***
*Ramis Muniandy v. PP [2001] 3 SLR 534* ***(foll)***

**Legislation referred to:**
Criminal Procedure Code, s. 182A(3)
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(da), 39A(2), 39B(1)(a)

*For the prosecution - Amir Hamdzah Othman DPP*
*For the accused - RSN Rayer; M/s R Nethaji Rayer & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Zamani A Rahim J:**

**[1]** The accused, aged 19 years and seven months (at the time of the commission of the offence) was charged with trafficking of dangerous drugs, to wit, 1767 grammes of cannabis on 30 March 2011, at about 5.30pm at belakang Lorong 11, Taman Guar Perahu, Kubang Semang, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) which carries a death penalty upon conviction.

**[2]** The prosecution's case is simple. Acting on information received pertaining to drugs trafficking activities, the accused was stopped and detained while riding a Honda EX5 motorcycle, bearing registration number PJB 1407. At the time of arresting him, the accused attempted to run away.

**[3]** A sports bag of "aL" brand, P14 was recovered from the carrier of the motorcycle. The bag, P14 was seized and examined. It was found to contain two slabs of compressed dried leaves which were analysed and confirmed by the government chemist to be dangerous drugs, cannabis weighing 1767 grammes as defined in s. 2 of the Act.

**[4]** Was the accused in possession of the sports bag, P14? At the time of the accused's arrest, the bag, P14 containing the cannabis were in the carrier of the motorcycle. It was visible to the accused. His father, SP2 was the owner of the motorcycle. The father allowed the accused to use the said motorcycle. The accused was riding the motorcycle at the material time. He was alone. He was therefore in charge of the motorcycle. These facts lead to the inference that he was in custody or control of the sports bag, P14 in the carrier of the motorcycle: see *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561.

**[5]** The next question requiring consideration is whether the accused has the knowledge of the cannabis in the sports bag, P14. At the time the accused was apprehended, he attempted to run away. Learned deputy argued that the accused has actual knowledge of the cannabis in the bag, P14 as his wallet containing his personal items were also recovered from inside the bag, P14. In other words the prosecution has proved that the accused has *mens rea* possession of the cannabis. The prosecution is not relying on the presumption of the knowledge under s. 37(d) of the Act. Learned deputy's stand is in line with what was said by Ambrose J in *Neo Koon Cheo v. Regina* [1959] 1 LNS 64 in that a conviction for dangerous drugs can be supported without having recourse to the presumption under s. 37(d) of the Act.

**[6]** On the issue of knowledge, the facts in the English case of *Deputy Public Prosecutor v. Brooks* [1974] AC 862 are this. A number of police officers saw a van with its engine running parked on a lay-by near an airstrip. On approach by the police officers, the respondent who was the driver and others who were in the cab of the van attempted to run away. The respondent was caught by the police. In the body of the van, which was neither

visible, nor accessible from the cab, were 19 sacks containing over 1,000 pounds of ganja. In allowing the respondent appeal, the Privy Council said:

> In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal statute as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which bring about the separation of propriety and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in *Reg v. Livingston* [1952] 6 JLR 95 it is, in their Lordship's view, wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only *actus reus* required to constitute an offence under s. 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The *mens rea* by which the *actus reus* must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3).
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> Upon the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching the magistrate was, in their Lordship's view, fully entitled to draw the inference that the Defendant knew what he was carrying in the van.

**[7]** See also the local case of *Neo Koon Cheo v. Regina* [1959] 1 LNS 64; [1959] MLJ 47.

**[8]** In the case of *Ramis a/l Muniandy v. PP* [2001] 3 SLR 534, the Singapore Court of Appeal propounded the question of knowledge necessary to establish possession and at p. 541 states:

> **Knowledge of drugs**
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> The starting point in the consideration of this issue was that we had already concluded that the drugs was already on Ramis's motorcycles when he entered the vicinity and that he had physical control of the drugs. In the absence of any reasonable explanation by Ramis, these facts were sufficient to lead to a strong inference that Ramis knew that the bag found on his motorcycle contained drugs.
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> In *Tan Ah Tee v. PP* [1978] 1 LNS 193 Wee Chong Jin CJ, delivering the judgment of the court, said ([1978-1979] SLR 211 at 217-218; [1980] 1 MLJ 49 at p. 52):
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> Even if there were no statutory presumptions available to the prosecution, once the prosecution had proved the fact of physical control or possession of the plastic bag and the circumstances in which this was acquired by and remained with the second appellant, the trial judges would be justified in finding that she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in their minds that she had possession of the contents within the meaning of the Act.

**[9]** *Ramis a/l Muniandy*'s case, *supra* was cited with approval by our Arifin Zakaria FCJ (as he then was) in the case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337.

**[10]** Based on the aforesaid authorities, the facts in this case are sufficient for me to draw an inference that the accused knew the sports bag, P14 in the carrier of the motorcycle he was riding, contained cannabis.

**[11]** In cross-examination it was suggested to the arresting officer, SP7 *inter alia*, that the sports bag, P14 belonged to Apit @ Hafiz, that the accused informed SP7 that the bag, P14 was placed in the carrier of the motorcycle by Apit @ Hafiz, that Apit @ Hafiz had absconded upon accused's arrest and that the wallet of Levi's brand was never found in the bag, P14. These suggestions were

A denied by SP7. In *PP v. Dato Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215 at p. 341; [1999] 2 MLJ 1 at p. 121, Augustine Paul J said:

> A suggestion in cross-examination can only be indicative of the
B case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. In this regard, it was observed in *Emperor v. Karimuddi Sheikh* AIR 1932 Cal 373:
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> C Mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution.

**[12]** I am therefore unable to consider those suggestions at this stage of the trial as they do not crystallize or settle down into
D evidence. What I have to evaluate is the evidence adduced by the prosecution on maximum basis as mandated in the Court of Appeal case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

**[13]** Also in cross-examination of the investigating officer, SP5 by
E learned counsel relating to the whereabouts of Apit @ Hafiz on 30 March 2011, SP5 said as follows:

> Hasil siasatan yang saya jalankan, semasa OKT ditangkap Apit @ Mohd Hafiz baru saja habis tugas di Kilang Pen Fabric di Pulau
F Pinang. Dia masuk kerja jam 8.00 pagi 30.3.2011 dan habis kerja jam 5.30 petang. Apit @ Hafiz pada hari itu dia tidak pernah pergi ke Guar Perahu, Kubang Semang.
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> Saya tidak mengesahkan dengan majikan Apit @ Hafiz yang dia bekerja hari itu.
>
> G Apit @ Hafiz tidak mengemukakan apa-apa bukti yang dia bekerja hari itu.

**[14]** The investigating officer's evidence clearly shows that Apit @ Hafiz had not met or had any dealing with the accused on the
H day in question, that is, on 30 March 2011, at about 5.30pm as he was at his work place.

**[15]** Despite the suggestions made by learned counsel has not crystallised into evidence, the prosecution has opted to call Apit
I @ Hafiz as its witness to rebut the suggestions as alluded above. The evidence of Apit @ Hafiz is what we commonly called

rebuttal evidence. In his evidence, Apit @ Hafiz said on 30 March 2011 he never met the accused. On that day, at about 8am, he went to work at Pen Fabric factory. On reaching home at about 6.30pm he did not go anywhere. On being challenged by learned counsel, Apit @ Hafiz said he could produce the punch card to show that he was working on that day ie 30 March 2011 from 8am to 5pm. The cross-examination of Apit @ Hafiz by learned counsel run as follows:

| | | |
|---|---|---|
| Katakan | – | Pada 30.3.2011 jam lebih kurang 5.30 petang kamu membawa OKT ke kawasan belakang Lorong 11 Taman Guar Perahu. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Masa itu awak menunggang motosikal awak sendiri dan OKT menunggang motosikalnya. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Kamu telah berhenti seketika dan menyerah satu beg jenama 'aL' kepada OKT. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Beg jenama 'aL' itu kamu tahu berisi dadah. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Semasa OKT hendak membuka beg jenama 'aL' itu, kamu melarang OKT dari membukanya. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Kamu telah meletak beg jenama 'aL' itu ke dalam raga motosikal OKT dan minta dia menunggang motosikal masuk ke Lorong Guar Perahu 11. |
| Jawab | – | Saya tidak bersetuju. |
| Katakan | – | Semasa OKT ditangkap, kamu ada di sana dan kamu telah meninggalkan tempat kejadian. |
| Jawab | – | Saya tidak bersetuju. |

Saya boleh buktikan saya bekerja di Pan Fabric pada 30.3.2011.

**[16]** On the continued hearing, like a chameleon Apit @ Hafiz had changed his evidence by saying that on 30 March 2011 he was not working on that day but he was at home with his sister, Norhafiza and mother. He recalled that he worked at Pan Fabric factory in the month of July and not March! He reiterated that he did not meet the accused the whole day on 30 March 2011. Perhaps, he is unable to produce the punch card, that explains why he changed his evidence.

**[17]** Having observed and heard the evidence given by Apit @ Hafiz in the witness box, I am of the considered view that he was not a reliable witness. He was not a witness of truth. If a witness is varying or giving inconsistent evidence without any valid reasons over the same fact, it is a good ground for believing that he is not a truthful witness: see *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1974] 1 LNS 61. I wholly reject Apit @ Hafiz's evidence. On this glaring inconsistent evidence given by Apit @ Hafiz, learned deputy prefers the version that Apit @ Hafiz was at home with his sister and mother on 30 March 2011, rather than he was at his work place ie, Pan Fabric factory on the day and time in question, without offering any explanation, let alone a satisfactory one. Learned deputy's stand is at variance with the investigating officer's version which resulted from her investigation that Apit @ Hafiz was at his work place at all material time. The inconsistencies are beyond reconciliation.

**[18]** Be that as it may, it is my view that at this stage the liability of the accused is not in any way affected by the evidence of Apit @ Hafiz. This is because the prosecution has made out a clear, unambiguous and complete case against the accused.

**[19]** The further question to consider is whether the accused was trafficking in the said cannabis weighing 1767 grammes. I am in agreement with learned deputy that the accused has actual possession or *mens rea* possession of the cannabis, the subject matter of the charge. As the net weight of the cannabis is in excess of the stipulated statutory limit, the presumption of trafficking under s. 37(da) of the Act is activated. The accused is deemed to be a trafficker.

**[20]** As a *prima facie* case has been made out against the accused, he is accordingly called upon to enter his defence for drugs trafficking charge under s. 39B(1)(a) of the Act, as charged.

**[21]** The accused elected to give evidence on oath. In his defence, the accused said he went to Lorong 11, Taman Guar Perahu, Kubang Semang at the request of Apit @ Hafiz, SP6. He went there riding his motorcycle. He followed Apit @ Hafiz who was riding on a separate motorcycle.

**[22]** On arrival at the said lorong, Apit @ Hafiz had placed a bag in the carrier of his motorcycle. The accused identified the bag a shown in photograph, P7 A and B, that is, P14. He attempted to open the bag. It was disallowed by Apit @ Hafiz. The accused said the bag did not belong to him. He did not know the said bag contained cannabis. His wallet containing his identity card, driving license and Maybank ATM card was found in his rear trousers pocket. It was not found in the bag, P14.

**[23]** The accused said that he did not attempt to run away upon arrest.

**[24]** The defence case is very brief. Despite its brevity, the accused's evidence has crystallised into evidence. The cross-examination by learned deputy was mainly in the form of 'I put it to you' had been denied by the accused. The accused was neither shakened nor broken. His evidence remained steadfast that the bag, P14 was not his and neither he knew its contents. There is no affirmative or positive evidence to prove that the accused had possession of the bag, P14 with knowledge of cannabis in it.

**[25]** Having said that, can the prosecution have recourse to the presumption under s. 37(d) of the Act which states as follows:

> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

**[26]** The application of s. 37(d) of the Act is exemplified in the Court of Appeal case of *PP v. Letchumanan Suppiah* [2006] 1 CLJ 557 wherein the facts are almost similar to the facts in this case. The police had ambushed and arrested the accused and upon inspecting the motorcycle that he was riding, found an orange plastic packet inside the carrier basket situated in front of the

A motorcycle. Inside the orange plastic packet, they found two other plastic packets containing certain pinkish and powdery substances that were subsequently identified and confirmed by a chemist to be heroin and monoacetylmorphines. The motorcycle did not belong to the accused but to his brother, who was not
B called as a witness. The High Court Judge found that proof of custody and control of the motorcycle was insufficient to activate the presumption under s. 37(d) of the Act to show that the accused was in possession of the dangerous drugs. The accused was acquitted and discharged at the close of the prosecution's
C case without calling for his defence as no *prima facie* case had been made out against the accused.

**[27]** On appeal to the Court of Appeal by the prosecution, Abdul Kadir Suleiman JCA (as he then was) had analysed the facts and
D said:

> The facts revealed that at the material time, the orange plastic packet was in the carrier basket of the motorcycle right in front of the accused placed between the handle of the vehicle and between his legs when he was riding it. Further it could even be
E seen by PW5 from a distance of about 6 to 7 feet away when he was doing the observation at the shopping area. So, it is beyond dispute that the accused must have known of the existence of the plastic packet and therefore, must have had in his custody or under his control this orange plastic packet which subsequently
F was established to contain the dangerous drugs.

**[28]** His Lordship went on to conclude that the presumption under s. 37(d) of the Act was applicable. His Lordship said as follows:

G > From the facts, the statutory presumption under s. 37(d) of the Act would operate against the accused, which until the contrary is proved, be deemed to have been in possession of such drugs and shall until the contrary is proved, be deemed to have known that they are heroin and monoacetylmorphines, the subject matter of the charge.

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**[29]** In this case, the distinguishing feature with *Letchumanan Suppiah*'s case, *supra* is that the accused evidence provides proof to the contrary. The bag, P14 did not belong to the accused. P14 was placed in the carrier of the motorcycle by Apit @ Hafiz. The
I bag, P14 was not transparent. It has to be opened to see its contents. Apit @ Hafiz did not allow the accused to open it when

the latter attempted to do so. He did not know the bag contained cannabis. The recovery of the accused wallet containing his personal items in the bag, P14 was too good to be true! No sane or reasonable man would place his wallet (containing his identity card, driving licence and Maybank ATM card) in the bag P14 knowing that the said bag contained proscribed drugs which attract death penalty. The accused version that his wallet was recovered from his rear trousers pocket was more probable. That being the case, the accused's evidence has rebutted the deeming provision of possession and knowledge of the drugs under s. 37(d) of the Act. As a result the prosecution had not proven its case beyond reasonable doubt.

**[30]** Learned deputy argued that based on the evidence of SP8 and SP7, the accused's evidence was untrue, unbelievable and failed to raise a reasonable doubt in the prosecution's case. Bear in mind that the existence of Apit @ Hafiz and the role played by him was disclosed by the accused to his father, SP2 as early as 10pm on 30 March 2011. The accused informed SP2 by phone that he was detained by the police because of Apit @ Hafiz. Three days later, SP2 visited the accused in the lockup at Balai Polis Bandar Perda where SP2 was told by the accused that "Apit bubuh barang dalam moto dia" (see para D – E p. 6 of Notes of Proceedings). The investigating officer, SP5 too said that a cautioned statement under s. 37 of the Act was recorded from the accused where a character named Apit was mentioned (see para D p. 27 of Notes of Proceedings). Thus the existence and role played by Apit @ Hafiz cannot simply be dismissed as improbable in the circumstances of this case.

**[31]** Further, during the prosecution's case, the prosecution sought to rebut the defence case by calling a rebuttal witness, Apit @ Hafiz. He was quite a colourful character. Having received a subpoena he failed to attend court on 10 September 2012. At learned deputy's request, a warrant for his arrest was issued (see para B-C p. 8 of Notes of Proceedings), but subsequently cancelled. On 11 September 2012, learned deputy made another request to the court to issue an order to produce (OTP) against Apit @ Hafiz as he was detained in prison (see para B-D p. 18 of Notes of Proceedings). Apit @ Hafiz finally testified on

A 13 December 2012. As indicated earlier, I found Apit @ Hafiz to be an untruthful and unreliable witness and I have rejected his evidence totally regarding his whereabouts on 30 March 2011. Thus the accused exculpatory evidence stand unshaken. But the prosecution's rebuttal evidence has collapsed. In a criminal trial
B the accused is allowed to take every opportunity to show the weaknesses or defects in the prosecution case. In that event, I am not in a position to invoke the presumption under s. 37(d) of the Act and amend the charge under s. 12(2), punishable under s. 39A(2) of the Act as was done in *Letchumanan Suppiah*'s case,
C *supra*. Furthermore, the prosecution is not relying on s. 37(d) of the Act.

**[32]** For the reasons given above, as the prosecution has not proved its case beyond reasonable doubt the accused is
D accordingly acquitted and discharged: see s. 182A(3)of the Criminal Procedure Code.

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